

In The

Supreme Court of the United States

Supreme Court, U.S.

F I L E D

States

JAN 14 1978

MICHAEL RODAK, JR., CLERK

October Term, 1977

No.

SABATO VIGORITO, et al.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

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In The

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vs.

UNITED STATES OF AMERICA,*Respondent.*

**PETITIONER FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

Petitioner, Sabato Vigorito, respectfully prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on October 13, 1977. A timely petition for rehearing *en banc* was denied, with two dissents, on December 15, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and appears as Appendix A to this petition. The Court of Appeals, by a divided (2-1) panel vote, affirmed a judgment entered after

a jury trial in the United States District Court, Eastern District of New York (Jacob Mishler, C.J.), which found petitioner guilty of complicity in operating an illegal gambling business in violation of 18 U.S.C. §1955. Petitioner was sentenced for a term of six months and fined \$20,000.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254. This petition for a writ of certiorari is filed within thirty days of the Court of Appeals' denial of the motion for reargument *en banc*.

QUESTIONS PRESENTED

1. Whether multiple, surreptitious, non-court authorized entries into a protected premises by FBI agents for the purpose of installing, maintaining and removing eavesdrop devices violates the Fourth Amendment and the Federal Wiretap Statute (18 U.S.C. §2510, *et seq.*).
2. Whether the tapes of the court-authorized eavesdrop orders were timely sealed.

STATUTORY PROVISIONS INVOLVED

The statutory provision involved is 18 U.S.C. §2518(8)(b) and appears as Appendix D to this petition.

STATEMENT OF FACTS

Petitioner was convicted with his co-defendants James Napoli, Sr., James Napoli, Jr., Michael DeLuca, Saverio Carrara, Bario Mascitti and Anthony DiMatteo of conducting an illegal gambling business from the period April to June, 1973. The government's theory of the case was that these defendants

and Eugene Scafidi and Robert Voulo¹ conducted a large-scale lottery-type gambling operation in Brooklyn, New York during certain discreet periods of time.

The government established its case against petitioner and his co-defendants through the introduction of electronically-seized court-authorized electronic surveillance conducted at the HiWay Lounge, a bar and grill located in the Williamsburg section of Brooklyn.

The surveillance at the HiWay Lounge took the form of electronic "bugs" which were surreptitiously installed inside the lounge by agents of the FBI.

The first "bug" (hereinafter "HiWay I") was installed, following the approval of the government's eavesdrop application by Hon. John R. Bartels, on April 12, 1973. The authorized period of surveillance was for 15 days, excluding Sundays. Petitioner was not an enumerated target of this eavesdrop order. However, his conversations were electronically seized by virtue of this eavesdrop order and such conversations were admitted against him at trial.

The second "bug" (hereinafter "HiWay II") was installed on May 3, 1973 after permission was obtained from Judge Bartels. This eavesdrop order was approved some three days following the termination of HiWay I. Petitioner was likewise not an enumerated target of the eavesdropping and was unnamed in the eavesdrop order. However, his conversations were seized pursuant to electronic surveillance, and these conversations were introduced against him at trial.

A third eavesdrop order (hereinafter "HiWay III") was issued on May 24, 1973, but the government consented to the

1. The latter two were likewise convicted of conducting an illegal gambling business during the period March to July, 1972.

suppression of these conversations because these tape recordings were not sealed until some three months after the termination of the eavesdrop order in violation of 18 U.S.C. §2518(8)(a).

Petitioner and his co-defendants moved prior to trial to controvert the eavesdrop orders and suppress the conversations seized thereunder *inter alia* upon the basis that the FBI agents had gained surreptitious and non-court ordered entry into the HiWay Lounge itself to install, rearrange and rejuvenate the batteries of the electronic surveillance devices employed. In addition, counsel contended that the tape recordings seized under HiWay I and II had not been timely and properly sealed, as required by 18 U.S.C. §2518(8)(b), and that the government had not offered a sufficient legal explanation for not sealing said tape "immediately", as the "sealing" statute requires.

Judge Mishler conducted a hearing upon defendants' motions and at the conclusion of the hearing denied the motion to suppress.

An extensive jury trial was held before Judge Mishler during July and August, 1976, during which the challenged electronically seized tape recordings were played to the jury. Petitioner was convicted of violating 18 U.S.C. §1955.

Following the imposition of sentence, petitioner and his co-defendants appealed their convictions to the Court of Appeals for the Second Circuit, where they renewed their arguments concerning the impropriety of permitting government agents to conduct multiple break-ins of the HiWay Lounge to install, reactivate and alter the positioning of the eavesdrop devices, as well as questions concerning the government's failure to strictly comply with the "sealing" statute.

By a divided (2-1) court, the Second Circuit affirmed the defendants' convictions. An application for rehearing and rehearing *en banc* was denied. This petition ensued.

REASONS FOR GRANTING THE WRIT

I.

The government's multiple and non-court sanctioned entries into the HiWay Lounge violated both the Fourth Amendment and the federal wiretap statute and required suppression of the conversations seized thereunder.

Notwithstanding the fact that electronic surveillance has received congressional approval only after, and as a direct result of, stern statutory controls placed upon wiretapping and the government agencies which conduct it, this case exemplifies the total abuse which exists when temporary governmental "lapses" at strict compliance with the wiretap statute (18 U.S.C. §2510, *et seq.*) are permitted to go unchecked. Sought by the government in an effort to gain oral evidence against an alleged band of Brooklyn gamblers, the eavesdrop orders involved in this criminal proceeding never spelled out or even suggested that the agents designated to install the electronic "bugs" employed herein had the right to break into a public bar and grill, like a band of common burglars, to install those devices.

On some five occasions, without receiving the approval of the judge who authorized the electronic surveillance, or any other neutral and detached magistrate, for that matter, agents of the government gained entry into the HiWay Lounge with all the stealth and cunning of common burglars. During these interludes, the government agents *sua sponte* installed the eavesdrop devices, moved the positioning of the eavesdrop devices, rejuvenated them and ultimately removed them. All of these procedures were conducted in the clear and conceded absence of judicially exercised authority or approval. Simply, the FBI went in and out and used the HiWay Lounge as if they owned it.

No one in the government told the court what it was doing or the frequency of their activity. In the self-proclaimed goal of seizing the conversations of gamblers, the FBI rode roughshod over the Fourth Amendment's warrant requirement and violated the privacy rights of dozens of American citizens.

We respectfully submit that the mere grant of judicial authority to install an eavesdrop device does not carry with it implicit authority to take any steps, including night-time burglary and criminal tampering, unless and until a federal judge approves such entry and activity after a proper, common sense, non-technical² application for leave to conduct such entry and activities.

This position is particularly pertinent when one considers that the premises involved in this case is a dimly lit bar and grill open to the public. It is certainly not clear, and the government bears the burden of explaining the propriety of its activity, whether the eavesdrop approving judge knew, much less reasonably suspected, that the activity complained of herein was contemplated by the government. By not alerting the court to the intentionally planned multiple break-ins which were conducted, the government lulled the judge into a false sense of judicial security and denied the judicial branch any input, which is constitutionally and statutorily required, as a condition precedent to the executive branch's non-consensual entry into the private premises of one of its citizens.

The propriety of this type of governmental activity has received review in our federal intermediate appellate courts. In *United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977), *aff'd*, 414 F. Supp. 879 (D.C. 1976), the Court of Appeals affirmed an order of the United States District Court for the District of Columbia which suppressed electronically seized conversations

which were tainted due to a series of surreptitious entries into the subject premises.

In *Ford*, as opposed to the case at bar, the government prosecutor took care to apprise the authorizing judge. No formal record was made, however, of the colloquy between the prosecutor and the court upon which basis court approval to make a surreptitious entry was granted. The court declined to hold that the power to intercept carries with it the unbridled right to take whatever steps law enforcement agents unilaterally determine are necessary to install the listening devices. Rather, the court recognized that each entry requires separate "on the record" judicial approval. Thus the court wrote:

"Essential to our holding is the premise that entries to plant 'bugs' are themselves invasions of privacy distinct from the actual eavesdrop, and therefore require separate consideration in the warrant procedure. If police are to be permitted to enter private premises to conceal eavesdropping devices — a question we leave unresolved — they at least must be required to proceed in accordance with the authorization of a warrant narrowly tailored to the demonstrated demands of the situation."³

In the case at bar the Second Circuit has declined to disapprove the multiple surreptitious entries involved under circumstances where the prosecution did not even attempt to apprise or secure approval from the authorizing judge. Thus, if anything, the governmental conduct in *Ford* is amenable to an argument of "good faith" — albeit a failure to fully comply with the warrant requirement's insistence that warrants be predicated upon an oath or affirmation. Nonetheless this failure to comply

2. See *Ventresca v. United States*, 380 U.S. 102 (1965).

3. See *United States v. Ford*, 553 F.2d 146 at p. 170.

with the warrant requirement and gain the requisite approval in the proper constitutional manner doomed the government's use of the evidence in *Ford*. In the case at bar the government conducted far more numerous covert entries and did not even attempt to act in good faith by obtaining formal or informal judicial approval. Thus this case is far weaker than *Ford*, both on the law and the facts, as well as equitably from the viewpoint of prosecutorial "good faith."

Similarly, in *Application of the United States*, 563 F.2d 637 (4th Cir. 1977), a panel of the Court of Appeals for the Fourth Circuit reversed a district judge's order which, after an *in camera* hearing, declined to authorize an application submitted by the Maryland United States Attorney to install an eavesdrop device inside a particular premises. In reversing the District Court, however, the Court of Appeals noted that the order in question sought both the interception of particularly described conversations *and* approval to conduct one or more surreptitious entries attendant to the installation and proper monitoring of the eavesdrop devices.

The Fourth Circuit went on to note that in its opinion the Congress, in enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (Title III), impliedly authorized necessary surreptitious entries where such were judicially found to be necessary and attendant to eavesdropping authorization. However, the court was careful to warn that:

"We do not mean to imply, however, that merely because Congress contemplated the use of surreptitious entries, a Title III order authorizing the interception of conversations gives eavesdroppers *carte blanche* to take any steps whatsoever to effectuate their plan. Secret physical trespass upon private premises for the purpose of planting a bug entails an invasion of privacy of constitutional significance distinct

from, though collateral to, that which attends the act of overhearing private conversations. While we have held that judicially granted permission to invade an individual's expectation of conversational privacy, pursuant to Title III's guidelines . . . such permission does not suspend the operation of the Fourth Amendment for other purposes." *Application of the United States*, 563 F.2d 637 at 643.

Separate judicial approval to make a covert or surreptitious entry was found to be a constitutional prerequisite to such a forced entry upon private property. Absent such approval, the right to enter will not be implied.

Similarly, in *United States v. Agrusa*, 541 F.2d 690 (8th Cir. 1976), *cert. denied*, ____ U.S. ___, the court held that surreptitious entries attendant to electronic surveillance are governed by the Fourth Amendment's warrant requirement such that entries may only be made pursuant to express judicial approval. Needless to say, the Federal Strike Force for the Eastern District of New York never considered or attempted to obtain this manner of approval. Their actions can be characterized not by *bona fides*, but rather simply as an exercise of raw, nonjudicially-monitored government power.

By sanctioning both the number and manner of FBI break-ins involved, the Second Circuit has travelled down the philosophical path of recognizing that the power to intercept carries with it the non-judicially reviewable grant to investigators to make trespassory contact however often and in whatever manner the police unilaterally deem fit. Under the guise that it is not the business of the judicial branch to play any role in sanctioning or monitoring the manner in which court-authorized intercept devices are placed, the court declined to find a judicial role in a crucial phase of eavesdropping.

Specifically, we dispute Judge Moore's thesis that requiring federal *nisi prius* judges to play an initial supervisory role in passing upon surreptitious entry provisos "would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competency was greater than that of the agencies presumably skilled in their field."

Indeed, in a somewhat analogous area, the federal judiciary has long been required to pass upon and find that electronic surveillance was being conducted after an exhaustion of "other investigative techniques" [see 18 U.S.C. §2518(1)(c)]. No one has suggested that this provision has drawn federal judges into the role of participants in "back up" teams, in the back seat of "prowl" cars or debriefing "stool pigeons". Rather, this provision has been interpreted to require a common sense showing that electronic surveillance is not an investigative tool of the first resort. Clearly both law enforcement and the courts have "lived" with 18 U.S.C. §2518(l)(c) and nothing "unseemly" has come of this compelled statutory relationship.

In sum; to hold, as does the Second Circuit, that once probable cause to conduct an eavesdrop operations exists the court washes its hands of and has no proper role in passing upon or regulating the nature and manner of "black bag" surreptitious entries into private property grants to law enforcement a delegation of power and control over private property never heretofore recognized in a free society during peacetime. The manner of installation clearly raises distinguishable, but nonetheless poignant, Fourth Amendment concerns which stand separate and apart from the license to intercept. Too much is constitutionally at stake to allow the federal judiciary to "pack its tent" and leave the question of monitoring such entries to the good graces of one's local FBI agent.

Two centuries ago this country fought for its independence from England, in some measure predicated upon its belief that the use of private homes for the quartering of British troops and the conduct of warrantless and random searches was odious and should not be tolerated. To sanction, as does the Second Circuit, non-judicially controlled "black bag" break-ins by federal law enforcement officers masquerading as third-rate burglars suggests that conduct we would not stomach from the British is acceptable when engaged in by an American constable.

We do not think so and have to believe that those freedom-fighters of two centuries ago would be repelled and revolted to learn that the government can break into private property when and how it wants to catch a petty criminal.

This writ should issue because, if this is the route we are taking in this country and if this is the Fourth Amendment path we are taking, the highest court in this country should affirmatively and distinctly say so. If the seal of approval is to be given to non-judicially authorized break-ins, this Court should be the one to sanction it and explain how the Fourth Amendment remains a viable protection in the aftermath.

II.

The tapes of the intercepted conversations were not sealed timely and properly. It was error to allow them to be introduced in evidence.

Title 18 of the United States Code, Section 2518(8)(a), which establishes the obligation to seal the tapes generated by electronic surveillance, provides:

"The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable

device. The recording of the contents of any section shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders."

It was mindful of this statutory obligation that defense counsel moved to suppress the government's use of the HiWay I and HiWay II tapes. More specifically, it was contended before Judge Mishler, and later on appeal before the Second Circuit, that the government's three day delay in sealing the tapes generated under both intercept orders violated Section 2518(8)(a) on its face. Nonetheless, the trial judge declined to suppress these tapes and the Court of Appeals affirmed the order of denial.

Initially, we note our disagreement with Judge Moore's holding that HiWay II was an extension of the eavesdropping conducted by virtue of the HiWay I intercept order. While it is concededly true that the same premises and many of the same people were targeted for electronic interception under both orders, we submit that HiWay II cannot be considered an extension of HiWay I as a matter of law.

At the time HiWay II approval was given, HiWay I had already been terminated for a minimum of three days. An extension has been defined as a "prolongation" (Funk & Wagnalls, *New Standard Dictionary of the English Language*). This presupposes, of course, that something is in existence which is to be prolonged. Since the predecessor order had already expired and had no post-termination viability, the concept that HiWay II was an extension of HiWay I is a legal and logical impossibility.

Turning to the length of "sealing" delay, six days by petitioner's calculations and three days by the government's, we respectfully submit that such delay undermines any finding that sealing was performed immediately.

A reading of the federal sealing statute reveals there is no ambiguity or equivocation to it. It simply states that immediately after an eavesdrop order has terminated, the prosecutor must transport the original tape recordings to the issuing judge, and he must seal the tapes.

The use of the word "immediately" was not, we contend, chosen casually by the Congress. Indeed, when one considers that Congress gave prosecutors a "reasonable time" to serve post-interception notices of interception [18 U.S.C. §2518(8)(d)], gave judges 30 days to notify the Administrative Office of the United States Courts concerning approval or denial of an eavesdrop request (18 U.S.C. §2519), that "progress reports" must be filed at such intervals as the judge may require [18 U.S.C. §2518(6)], and that prosecutors must move to amend their eavesdrop orders as "soon as practicable" when evidence of offenses not specified in the original intercept order are overheard [18 U.S.C. §2515(5)], it is manifest that the legislative body made these types of time distinctions within one title of a statute with the intention that strict compliance will be forthcoming.

The sealing requirement has been given strict construction by many of the federal and state courts which have considered it. See *United States v. Gigante*, 538 F.2d 502 (2d Cir. 1976); *United States v. Ricco*, 421 F.Supp. 401 (S.D.N.Y. 1976); *People v. Nicoletti*, 34 N.Y.2d 249, 356 N.Y.S.2d 855 (1974); *People v. Sher*, 38 N.Y.2d 600, 381 N.Y.S.2d 843 (1976). Indeed, in *People v. Scaccia*, ____A.D.2d____, 390 N.Y.S.2d 743 (4th Dept. 1977), a 14 day sealing delay was found fatal. In *People v. Guenther*, 81 Misc. 2d 258, 366 N.Y.S.2d 306

(Sup. Ct. 1975), a seven day sealing delay was deemed fatal. In *People v. Seidita*, N.Y.L.J. 3/25/77, p. 15, col. 4 (Sup. Ct. 1977), the court declined to excuse a six day delay in sealing and suppressed the intercepted conversations. In *People v. Washington*, 55 A.D.2d 609 (2d Dept. 1976), although a longer (39 days) delay was involved, the making of duplicate tapes did not excuse the delay in sealing.

The delay in sealing in the case at bar was sought to be explained by the government on the basis that it needed time to process their application. This position was adhered to, notwithstanding the fact that HiWay II was begun to be processed as early as May 1, 1973. The government prosecutor travelled to the Justice Department in Washington, D.C., but was unable to explain why it took until May 3 to gain approval for HiWay II. No explanation was offered to suggest why he waited until the day he applied for another intercept order to have the tapes of HiWay I sealed. Similarly, the tapes generated under HiWay II were sealed on the day application for approval of HiWay III was made.

During the interim between interception and sealing, the tapes were kept by Agent Parsons in a file cabinet in his office. He believed he had the only key, but was uncertain whether there were other keys in existence. It was not a special cabinet. Approximately 100 other agents occupied and actively worked in that room. On some occasions, he received the tapes the day after the interception. The individual boxes the tapes were in were not sealed. The procedure followed upon sealing was that a large box containing a series of tapes was sealed, not the individual boxes containing the tapes. On some occasions when Parsons was out of the office, the tapes were given to another agent to whom he gave the key to the cabinet.

The agent also stated that the wait to seal was predicated upon the plan to have them sealed when the next order was

signed. The agent testified that the tapes were taken by him from the file cabinet and reproduced and returned prior to their sealing.

The prosecutor testified that on certain occasions when Agent Parsons did not receive the tapes on the same day they were recorded, but on a subsequent day, during the hiatus another agent would keep the tapes in his custody.

The court denied the motion. The court based its decision upon its conclusion that the tapes were sealed at the time of the signing of another order, in the case of HiWay I, of course, HiWay II, and in the case of HiWay II, HiWay III, and that these subsequent orders were extensions of the earlier ones and were obtained expeditiously.

We disputed below and renew herein the concept that delays occasioned by the lethargy of a prosecutor or to enhance his own convenience cannot excuse delays of this nature. For this reason, the rationale of sealing, i.e., to insure the integrity and reliability of the tapes, was undermined at bar not only by the delay, but also by the vagueness and laxity of the security surrounding some, if not all, of the tapes.

When one considers that FBI Agent Parsons testified that some of the tapes were held by the monitoring agents overnight and were not delivered to him until the following day, that after the tapes were duplicated they were placed in a file cabinet in a room where 100 agents were present under circumstances where Parsons was not sure he possessed the only key, that during Parsons' absence he delegated the duty of storing the tapes to another, and that the government adduced no evidence below as to what this agent did during this period, it certainly cannot be said that the sanctity of these tapes has been insured.

Mindful of all of the above and the importance of the sealing process of every jurisdiction which permits electronic

surveillance, this Court should grant the writ of certiorari and provide vital guidance in this important area of evidence gathering.

CONCLUSION

For the reasons stated, we respectfully pray that a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be granted and that this case be paired with the petition of James V. Napoli, Sr. and James V. Napoli, Jr.

Dated: New York, New York
January 12, 1978

Respectfully submitted,

GUSTAVE H. NEWMAN
Attorney for Petitioner
Sabato Vigorito

ROGER BENNET ADLER
Of Counsel

APPENDIX A DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED OCTOBER 13, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 909, 910, 911, 912,
913, 914, 915, 916, 917—September Term, 1976.

(Argued May 16, 1977 Decided October 13, 1977.)

Docket No. 76-1495

UNITED STATES OF AMERICA,

Appellee,

—against—

EUGENE SCAFIDI, BARIO MASCITTI, ANTHONY DiMATTEO,
SAVERIO CARRARA, MICHAEL DeLUCA, JAMES NAPOLI, JR.,
JAMES V. NAPOLI, SR., ROBERT VOULO and SABATO VIGORITO,

Appellants.

Before:

MOORE, SMITH and GURFEIN,

Circuit Judges.

Appeal from judgments entered in the United States District Court for the Eastern District of New York before Honorable Jacob Mishler, *Chief Judge*, convicting appellants of conducting illegal gambling businesses in violation of 18 U.S.C. §1955.

All convictions affirmed.

FRED F. BARLOW, Special Attorney, Department of Justice, Brooklyn, New York; and

Decision of the United States Court of Appeals

MICHAEL E. MOORE, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney for the Eastern District of New York; William G. Otis, Attorney, Department of Justice, of counsel), *for Appellee.*

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DAVID J. GOTTLIEB, Esq., New York, New York (The Legal Aid Society, Federal Defender Services Unit, New York, N.Y., William J. Gallagher, of counsel), *for Appellant Mascitti.*

RICHARD W. HANNAH, Esq., Brooklyn, New York, *for Appellant DiMatteo.*

SALVATORE PIAZZA, Esq., Brooklyn, New York, *for Appellant Carrara.*

MAX WILD, Esq., New York, New York (Albert J. Brackley, Esq., on the Brief), *for Appellant DeLuca.*

THOMAS J. O'BRIEN, Esq., New York, New York, *for Appellant Napoli, Jr.*

MAX WILD, Esq., New York, New York (Rubin Baum Levin Constant & Friedman, of counsel), *for Appellant Napoli, Sr.*

DOMINICK L. DICARLO, Esq., Brooklyn, New York (Donald E. Nawi, of counsel), *for Appellant Voulo.*

GUSTAVE H. NEWMAN, New York, New York, *for Appellant Vigorito.*

Decision of the United States Court of Appeals

MOORE, *Circuit Judge:*

Nine defendants, Eugene Scafidi, Robert Voulo, James Napoli, Sr., James Napoli, Jr., Michael DeLuca, Sabato Vigorito, Saverio Carrara, Bario Mascitti, and Anthony DiMatteo appeal their convictions, after a jury trial before Chief Judge Mishler in the Eastern District of New York, for operating illegal gambling businesses in violation of 18 U.S.C. §1955.

The counts upon which the various defendants were convicted related to operations at different times and places. More specifically, twenty defendants were tried together on four counts of a seven-count indictment. Scafidi and Voulo were convicted on Count Two (the "967 East Second Street Count") of conducting an illegal gambling business from March, 1972 to July 1972. Appellants Napoli, Sr., Napoli, Jr., DeLuca, Vigorito, Carrara, Mascitti, and Di Matteo were convicted on Count Four (the "Hiway Lounge Count") of conducting an illegal gambling business from April, 1973 to June, 1973. Count Three (the "Apartment 309 Count") was dismissed after trial because the jury did not find five people involved in that gambling business, as required by §1955. Count Seven, the conspiracy count, was dismissed at the close of the Government's case because the indictment alleged a single conspiracy but the evidence showed at least two. Sentences for the defendants ranged from five years in prison and a \$20,000 fine (Napoli, Sr.) to two months in prison and 34 months probation (Scafidi).

I.

The evidence at trial showed a large-scale numbers lottery operating in Brooklyn during three discrete time periods: Spring, 1972 (the 967 East Second Street Count); Winter, 1972-73 (the Apartment 309 Count); and Spring, 1973 (the Hiway Lounge Count).

Decision of the United States Court of Appeals

The 967 East Second Street Count: Scafidi and Voulo.

On May 1, 1972, FBI agents conducted a warrant-authorized search of a residence at the above address. They discovered Voulo and two others in the basement operating a policy "bank". They seized a great deal of betting paraphernalia, some of which contained Voulo's fingerprints.

Visual surveillance prior to the search had established that Voulo, Scafidi and others had been using the residence for more than one month. Apparently, Scafidi regularly picked up daily policy "ribbons" for delivery to the ring's "controllers" around the city.

Also, a warrant-authorized search of 405 Elder Lane in Brooklyn in June, 1971, had found Scafidi and Voulo standing at a table piled high with betting slips, adding machines and cash.

The Apartment 309 Count: DiMatteo, Mascitti, Scafidi, Voulo, and Rocco Riccardi (all charged, but count dismissed after guilty verdicts were rendered only against the first four).

The evidence on this count consisted primarily of tape recordings made pursuant to court-ordered electronic equipment (referred to herein as "bugs") placed at the apartment of a friend of Mascitti. The friend allowed Mascitti to use the apartment for a few hours each afternoon while she was absent. DiMatteo and Mascitti were shown to be "bank" workers who called Scafidi about gambling at least once each day. A court-ordered wiretap of Scafidi's home phone showed that he operated a lottery "accounting office". Because one defendant, Riccardi, was acquitted on this count, the Government failed to show the involvement of five people in the operation, as necessary under §1955. The count was thus dismissed.

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Three court orders had authorized the bugs at Apartment 309: Orders 309-I, 309-II, and 309-III. 309-I was issued by Judge Orrin G. Judd on December 8, 1972, and authorized interceptions for 15 days. 309-II was issued by Judge Jack B. Weinstein on January 15, 1973, permitting interceptions for 15 days. 309-III was issued by Judge George Rosling on February 20, 1973, approving interceptions for 15 days at Apartment 309 and at Scafidi's residence in Queens. All the orders listed some of the defendants by name and included "others as yet unknown" as targets. The bugs at Apartment 309 were installed on the night of December 8, 1972, after the building superintendent gave the agents a key to gain entry. The agents re-entered the apartment once more during the surveillance to reposition one bug.

Because the Apartment 309 Count was ultimately dismissed, any investigatory errors of the police are relevant on appeal only to the extent that the evidence presented for this Count might have "spilled over" to affect other counts.

The Hiway Lounge Count: The Napolis, DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo.

This was the principal count. Court-ordered bugs revealed that the Lounge was the headquarters for a massive numbers game. James Napoli, Sr. was the leader, with Napoli, Jr., Carrara, and Vigorito working as "controllers". DeLuca worked as an "accountant", and Mascitti and Di Matteo were "bankers".

The bugs at the Lounge had been installed pursuant to three court orders: Orders Hiway-I, Hiway-II and Hiway-III. Hiway-I was issued by Judge John R. Bartels on April 12, 1973, authorizing interceptions for 15 days excluding Sundays. The named targets were the Napolis,

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DiMatteo, DeLuca, Martin Cassella and Richard Bascetta. Hiway-II was issued by Judge Bartels on May 3, 1973, i.e., three days after the end of Hiway-I, authorizing the bugs for 15 more days, excluding Sundays. The targets named were the Napoli, DeLuca, Voulo, several non-appellants, and "others as yet unknown". Hiway-III was issued on May 24, 1973, i.e., three days after the end of Hiway-II. The tapes obtained by Hiway-III were not sealed until more than three months later. No evidence from Hiway-III was introduced at trial.

The listening devices used in the Lounge were placed by FBI agents on the night of April 12-13, 1973. They were originally placed with one at the bar and one in a back room. During the pendency of Hiway-I the agents re-entered the Lounge to move the bar bug into the back room. During the three-day "pause" between Hiway-I and Hiway-II, Judge Judd issued an order authorizing the agents to enter the Lounge on the night of May 2-3 to restore the batteries in the bugs. At some point during Hiway-II and Hiway-III the agents re-entered to restore the batteries once again.

II.

The appellants raise many points of alleged error and each adopts the points argued by the others.

Besides the question of standing, namely, the right to question the legality of the surreptitious entries by agents to place the electronic devices which recorded the appellants' conversations, appellants' arguments focus primarily on various claims that the warrants pursuant to which the agents acted were for numerous reasons illegal and violative of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.*

At the close of the Government's case, the conspiracy count was dismissed as to all appellants because of the dis-

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crepancy between the single conspiracy alleged in the indictment and the evidence of multiple conspiracies shown at trial. The Court's dismissal of the conspiracy count gives rise to appellant's claim that reversible error resulted from the Court's refusal to grant a mistrial or to sever the trial as to the individual defendants. Their claim is that the spill-over effect of the evidence admitted pursuant to the conspiracy count was highly prejudicial and probably responsible for the respective convictions.

Whether appellants have standing to object to the surreptitious entries of Apartment 309 and the Hiway Lounge.

Appellants argue that the evidence derived from the bugs planted in Apartment 309 and the Hiway Lounge should be suppressed because of allegedly improper surreptitious entries made by the agents to place and recharge the bugging devices. The Government contends that none of the appellants has standing to question the entries into Apartment 309, and that only Napoli, Sr. has standing to object to the entries into the Lounge.

All of the appellants were in some way overheard on the bugs planted in Apartment 309 and/or the Lounge. Thus, they all claim that they have standing to object to any unauthorized entries because they are "aggrieved persons" within the meaning of 18 U.S.C. §2510(11). But that statute simply confers standing to object to unauthorized electronic surveillance; it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge the bugs. Only one present at the seizure or with a recognized "interest", either possessory or proprietary, in the premises, can claim the required "expectation of privacy" needed to object to such illegal entries. See *Alderman v. United States*, 394 U.S. 165 (1969) (proprietor can object to any unauthorized wiretap; those over-

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heard can object only to their voice being overheard); and *Brown v. United States*, 411 U.S. 223 (1973) (those with no interest in storehouse cannot object to illegal search which uncovered stolen merchandise).

The elder Napoli was the manager of the Hiway Lounge, and as such can raise any issue of unauthorized entry. But none of the other appellants had any interest in the Lounge except for their presence there for a few hours each afternoon. Mascitti has an arguable claim to a proprietary interest in Apartment 309 because the true lessee, his friend, lent him the apartment's key so that he could enter on his own. But the district court found that his possession of the key and use of the premises for such a limited purpose was not enough to give him standing.

Whatever the exact, technical interests, or lack thereof, which these appellants had in the premises entered by the agents, it seems artificial to say that a person overheard, whose conversation would not have been overheard but for the entry, has no standing to move to suppress the conversations on a claim that the entry was improper. In any event, whether standing is accorded in this appeal to only one or any number of the appellants will not affect our holding that the Orders and the agents' activities were entirely proper. Therefore, for purposes of this appeal, we need not decide whether or not standing exists for the defendants to raise the claim of allegedly illegal entry.

Whether a court order authorizing illegal entry for secret placement, repair and/or removal of bugs is required as a part of, or in addition to, the court order authorizing the use of bugs.

Mascitti and his co-appellants claim that Title III of the Omnibus Crime Control Bill of 1968, 18 U.S.C. §2510 *et seq.*, prohibits all surreptitious police entries to install,

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repair or remove court-authorized bugs. However, it is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures. See *United States v. Ford*, 414 F.Supp. 879, 883 (D. D.C. 1976), *aff'd* 553 F.2d 146 (D.C. Cir. 1977); S.Rep. No. 1097, 90th Cong., 2d Sess. 67, 103 (1968).

There remains the question of whether the authority granted by Title III is properly implemented where the court which approves the use of bugs does not explicitly authorize, either in the authorization order or in a separate order, secret break-ins to place, repair and/or remove the bugs. The Government argues that permission to make secret entries is at least implied in the bug authorizations here. Appellants argue, however, that all evidence gathered must be suppressed unless the court specifically authorizes secret entries.

The courts appear to be split on this issue, particularly after the recent District of Columbia Court of Appeals decision wherein it was held that the legislative purpose of Title III requires a separate court order for entry, *United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977). See *United States v. Altese*, No. 75 Cr. 341 (E.D.N.Y., Oct. 14, 1976) (separate order *not* required); *United States v. Dalia*, 426 F.Supp. 862, 865-66 (D.N.J. 1977) (separate order *not* required); *United States v. Finazzo*, 429 F.Supp. 803, 806-8 (E.D.Mich. 1977) (separate order required). It must be noted that until the District of Columbia Circuit spoke on this issue, it was generally considered proper practice *not* to require a separate warrant for entry.

The orders in our case, after a recital of facts charging that various appellants "have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning in whole or in part

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a gambling business" in violation of State and Federal law, authorized the agents to intercept oral communications of the appellants specified therein at the named premises. The orders further provided that

"this authorization to intercept oral communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception. . . ." App. at A238, A276.

There can be no doubt that the warrants were based upon adequate factual affidavits. The alleged defect in the warrant is not the underlying factual basis therefor, but its lack of specific "breaking-in" authorization and a statement of the manner in which such "breaking-in" was to be conducted.

But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

As Chief Judge Mishler stated below in his Memorandum Decision dated October 14, 1976,

"[I]t is this Court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment." App. at A133.

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Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. If the instrumentality to be used is a "bug", the placing of such a bug must of necessity be in the hands of the persons so authorized. And such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations.

It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation. But neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed that a court should be required in its order to specify the method of entry, the appropriate location of the bug, and the steps to insure its proper functioning. Were this to be required, a judge, in consultation with law enforcement officers, might have to visit the premises to be entered and discuss the best (or least objectionable) method of entry and the areas for the installations. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created by unforeseen emergencies, would create a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field. It is significant that the statute, generally so detailed in its supervisory requirements, makes no mention of any need for a separate entry order. That the statute requires general supervision by the courts over

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the bugging operation does not even impliedly impose on them the practical enforcement steps.

We, therefore, hold that when an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required.

Nor do the subsequent entries for repair or battery recharging alter this result. These were not entries for any purpose other than that originally authorized. No greater incursion into the appellants' privacy occurred from the re-entries than resulted from the original entries. Furthermore, there is no suggestion that in any of the entries the FBI agents seized or attempted to seize or inspect papers or other articles not embraced in the order. They adhered to the authorized single purpose of seizing conversations represented in the papers on which the orders were granted as being of a criminal nature.

Whether the Government violated various provisions of Title III.

Mascitti contends that the affidavits underlying Order 309-I did not sufficiently demonstrate the need to bug the particular apartment. This claim is groundless. Physical surveillance of Apartment 309 had detailed the regular goings and comings of DiMatteo and Mascitti, and analysis of the apartment's trash had revealed betting slips and records.

Napoli, Sr. presents a similar insufficiency contention regarding the affidavit for interceptions at the Hiway Lounge. But the affidavit presented information gleaned from the bug of Apartment 309 as well as information gotten from confidential informants with established records of credibility. Also, physical surveillance identified the comings and goings of the principal suspects. The 25-

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page affidavit of Special Agent Parsons reveals more than sufficient information to justify the issuance of the Hiway-I warrant. App. at A277-A302.

DiMatteo argues that the affidavit underlying the bugs at Apartment 309 did not sufficiently demonstrate what other investigative procedures had been tried without success. See 18 U.S.C. §2518(1)(c). But the affidavit adequately informs the judge of the "nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods", which is precisely what it has to do to satisfy the statute. *United States v. Hinton*, 543 F.2d 1002, 1011 (2d Cir. 1976), cert. denied, 97 S.Ct. 493, 796 (1977); *United States v. Fury*, 554 F.2d 522, 530 (2d Cir. 1977).

Mascitti, DiMatteo and Vigorito argue that the "delays" in sealing the tapes of conversations after the expiration of their authorizing orders require suppression of the tapes.

In *United States v. Fury*, *supra*, 554 F.2d at 532-33, we held that, where a single order was extended, the tapes did not have to be sealed until the end of the last extension. Where the intercept is of the same premises and involves substantially the same persons, an extension under these circumstances requires sealing only at the conclusion of the whole surveillance. *United States v. Principie*, 531 F.2d 1132, 1142 n.14 (2d Cir. 1976), cert. denied, 97 S.Ct. 1173 (1977). The foregoing applies to the short delays in sealing 309-I and 309-II as well as Hiway-I and Hiway-II, for once the later Orders are deemed extensions of the prior ones, the administrative delay in sealing—in only one instance more than seven days—is reasonable and fully understandable. Even if the later Orders are deemed separate events, the sealing delays are quite distinguishable from those in the case relied upon by the appellants, *United*

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States v. Gigante, 538 F.2d 502 (2d Cir. 1976), where the unexcused delay was for over eight months.

The only tapes that were not sealed during the pendency of a subsequent extension order were those made pursuant to Order 309-III. These tapes were sealed after a delay of seven days caused primarily by the preoccupation of Special Attorney Barlow with preparations for the upcoming trial. Testimony presented to the trial judge made clear that the delay was not the result of any intent to evade statutory sealing requirements or to gain any tactical advantage. We agree with the trial judge that the Government has presented a satisfactory explanation for this short delay, fully in accord with the requirements of 18 U.S.C. §2518(8)(a). *United States v. Fury*, *supra*, 554 F.2d at 533.

Vigorito argues that the Government continued the Hiway-I and -II bugs beyond their 15-day expiration dates. But the authorizations for the bugs expressly excluded counting Sundays, so that all of the overheard conversations were within the authorized time periods.

Mascitti contends that the Government's failure to timely file "progress reports" to the authorizing judges requires suppression of the tapes gotten from the bugs. In several instances involving the 309 Orders, progress reports were filed up to two weeks late or not at all; with the Hiway Orders, one report was filed two days late. While these reports should have been timely filed, the sanction for failure to do so is surely not automatic suppression of the tapes. The requirement of reports, designed to enable the district judge to evaluate the continuing need for surveillance, is in the first instance discretionary with the judge authorizing the bugs. *See United States v. Iannelli*, 477 F.2d 999, 1002 (3rd Cir. 1973), *aff'd* 420 U.S. 770 (1975). So, surely, are any sanctions for failure to file timely. *See*

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18 U.S.C. §2518(6). The judges here clearly did not abuse their discretion.

Carrara argues that the Government's failure to name him in the Hiway-II order requires suppression of his conversations gathered by that order. This argument is entirely refuted by *United States v. Donovan*, 429 U.S. 413 (1977). Napoli, Sr.'s similar claim is also refuted by *Donovan*.

DiMatteo argues that the misidentification of him as "Pasquale Rossetti" in Order 309-I requires suppression. This argument is frivolous in light of the complete absence of evidence that the Government was not acting in good faith. And the argument of DiMatteo based on failure to serve a timely inventory notice is foreclosed by *United States v. Donovan*, *supra*. *See also United States v. Variano*, 550 F.2d 1330, 1335-36 (2d Cir. 1977).

Whether there was sufficient evidence to convict Scafidi and Carrara.

Only Scafidi and Carrara question the sufficiency of the evidence against them.

Scafidi was observed regularly using 967 East Second Street. In fact, he arrived at the apartment once while the police were searching it. Prior to and subsequent to the use of the apartment, Scafidi had been involved with policy rings which used the same type of wagering records and the same runner identifications. Also, Scafidi's phone calls from his home, properly intercepted by wiretaps, convincingly proved his involvement with the venture.

Carrara was taped while in several incriminating conversations with Napoli, Sr. which strongly support the inference that Carrara was actively involved in the ring as one of its "controllers". The jury properly convicted him on this basis.

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Whether Count Four of the indictment (the Hiway Lounge Count) was legally sufficient.

Napoli, Sr. contends that the Hiway Lounge count of the indictment was fatally defective for not specifying the type of gambling business he was alleged to have conducted. This argument holds no merit. The indictment tracked §1955 while specifying approximate dates and relevant New York statutes. This is sufficient under *United States v. Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), *cert. denied*, 415 U.S. 985 (1974).

Whether appellants were prejudiced by "spill over" from their joint trial.

Most of the appellants (Napoli, Jr., Mascitti, Vigorito, Voulo, DeLuca, and Carrara) argue that once the trial court dismissed the conspiracy count at the end of the Government's case, the remaining substantive counts should have been severed for separate trials. The settled rule is that such a severance is not required unless prejudice would otherwise result or unless the conspiracy count had not been alleged in good faith. *United States v. Ong*, 541 F.2d 331, 337 (2d Cir. 1976), *cert. denied*, 429 U.S. 1075 (1977). There is no evidence here of bad faith on the part of the Government, and the conspiracy count was not frivolous; it was dismissed only for variance. The trial court gave the jury a lengthy cautionary instruction to disregard the conspiracy evidence and to judge each defendant on his own words and deeds. The jury showed its understanding of the instruction by acquitting several defendants. Moreover, the defendants convicted were found guilty on strong evidence, greatly reducing any risk of prejudice from joinder.

We have carefully considered all of the numerous issues raised by the appellants and find them to be without merit. The convictions are affirmed.

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GURFEIN, Circuit Judge, concurring:

The dissenting opinion of my respected brother, J. Joseph Smith, and the split in the circuits, *see United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977), and *compare United States v. Agrusa*, 541 F.2d 690 (8th Cir. 1976), impels me to add some of my own reasons for concurring in the majority opinion. Congress has constructed a statutory scheme for meeting the problems raised in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967), by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* The issue is narrow. When a federal agent obtains access by trespass to premises in which he has been ordered to install a device to intercept oral communications by a court order which faithfully follows Title III and which includes a finding of probable cause, has he nevertheless intercepted conversations in a lawless manner as if he had no court order at all? Was there in fact "a neutral pre-determination of the scope of [the] search"? *Katz v. United States*, 389 U.S. at 358. Or are entries to plant "bugs" themselves unconstitutional invasions of privacy *distinct from* the actual eavesdrop sanctioned in the order? An affirmative answer was "[e]ssential to [the] holding" in *United States v. Ford*, *supra*, 553 F.2d at 170, on constitutional grounds. I respectfully disagree.

Title III covers oral interceptions ("bugging") without prescribing any duties for the judicial branch on the method to be used in installing the "bug". These statutory requirements were carefully tailored to meet the constitutional requirements set out in *Berger* and *Katz*. *See United States v. Tortorello*, 480 F.2d 764, 771-75 (2d Cir. 1973). Congress knew that whether a "bug" was put in place by trespass or otherwise, the use of a "bug" to intercept conversations would require a warrant except when the "bug" is carried

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by a participant in a face-to-face conversation, *On Lee v. United States*, 343 U.S. 747 (1952), or is used with the consent of a party. *See Katz, supra.* The warrant under Title III is limited to interception of oral conversations, 18 U.S.C. § 2518, and does not in any way permit the search and seizure of goods or papers on the premises. Indeed, if such goods or papers were subjected to search under the interception order, suppression would follow. There is an analogy to the opening of foreign mail by the Customs, which is not constitutionally offensive provided the letters themselves are not read. *See United States v. Ramsey*, — U.S. —, 45 U.S.L.W. 4577 (June 6, 1977).

What the statute requires is not a specification by the judge of the method for placing the "bug" but simply "a particular description of the place where the communication is to be intercepted". Congress knew that an order such as is under review, that "electronic surveillance of the oral communications of the above-named subjects *shall occur* at the above described premises" (emphasis added), would require covert installation. If supporting proof were needed, it is supplied by the 1970 Amendment, Pub. L. No. 91-358, Title II, § 211(b), 84 Stat. 654 (amending 18 U.S.C. § 2518(4)), under which the order authorizing interception of an oral communication may direct a landlord or custodian, among others, to furnish the applicant with all facilities and technical assistance necessary to "accomplish the interception *unobtrusively*" (emphasis added). This provision is not for the protection of the subject of the interception order since it is to be incorporated only "upon request of the applicant". In sum, if the enforcement agent thinks that he can achieve such cooperation on his own, he need not get a court order to execute his mission "unobtrusively" with the cooperation of the landlord or custodian.

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With its attention having been called to the need for doing the job "unobtrusively" to the point of enlisting the aid of persons whose aid would amount to trespass, Congress failed to include in Title III a provision such as is found in the New York Criminal Procedure Law § 700.30 (8) which requires that an eavesdropping warrant contain "[a]n express authorization to make secret entry upon a private place or premises to install an eavesdropping device if such entry is necessary to execute the warrant",—a provision added to the otherwise almost verbatim copying of 18 U.S.C. § 2518(4). The judge to whom an application is made may, of course, require more than the statute prescribes before he is willing to sign the order, but the requirement that he separately sanction each surreptitious entry is nowhere to be found in the statutory scheme. That can hardly be due to congressional oversight. It is implicit that ordinarily only a single entry need be made, save in the exigent circumstance of equipment malfunction, as was the case here. Because the statute does not require the judge to authorize the manner of entry, a contention that the judge is nevertheless required to do so must rest on a reading of the Fourth Amendment itself.

The Fourth Amendment in part reads: "... no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The orders here do conform precisely to the requirements of the Fourth Amendment as well as those of § 2518. They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authoriza-

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tion is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.

Since the right of the named persons to privacy has already been subjected to the "probable cause" test at the hands of an independent judicial officer and since the order is detailed enough to defeat any realistic claim that it is a "general warrant," I believe that the basic requirements of the Fourth Amendment have been met. I respectfully suggest that cases which have held trespass to be invalid in the absence of *any* warrant whatever are hardly dispositive. *But cf.* the discussion in *United States v. Ford*, *supra*. In *Berger* there was a surreptitious entry but the Supreme Court failed to note it as a separate constitutional problem. *See* 388 U.S. at 45, 53-64, 81-82, 96-97, 107-12. We do have here "the procedure of antecedent justification . . . that is central to the Fourth Amendment." *See Osborn v. United States*, 385 U.S. 323, 330 (1966).

Judge Smith notes that there may be a danger in surreptitious entry. That may be conceded, but the federal judge is hardly in as good a position to evaluate such risks as is the law enforcement agent. Common sense will suggest that, in the absence of a plausible ruse, the "bug" should be put in place when the premises are vacant. A mistake as to whether they are occupied, in fact, could hardly be corrected by a judicial order.

Now that attention has been called to this question in several circuits, it is hoped that Congress will provide the national consensus needed to reconcile the needs of law enforcement with the rights of privacy that belong to all persons until probable cause has been shown and the approval of an independent judge obtained. The finding of what the judge must do in these circumstances to keep the "search" reasonable is, I think, within the prerogatives of Congress. In the meantime, until the Supreme Court

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speaks, it might be advisable for district judges to make a general direction for forcible or surreptitious entry a part of the interception order, not so much on constitutional grounds, *see United States v. Agrusa*, 541 F.2d 690, 696-98 (8th Cir. 1976),¹ as for the protection of the agents.

SMITH, Circuit Judge (dissenting):

I respectfully dissent. I would reverse for retrial as to all defendants, with all evidence obtained by electronic surveillance after warrantless surreptitious entries suppressed. The course followed by the agents here makes a mockery of the promise that the "dirty business" of electronic eavesdropping authorized by the Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), would be strictly supervised and controlled. Title III of the 1968 Crime Control Act was drafted with the *Berger* and *Katz* decisions as a guide, including the *Katz* requirement to "conduct the search within precise limits established by a specific court order. . ." 1968 U.S. Code Cong. & Ad. News 2162, 2163. It is not too much to ask that a magistrate pass upon the necessity for and the manner of surreptitious entries into private premises, either business or residential, in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy. The dangers may vary greatly between such methods as the planting of a bug by a restaurant patron, and a forcible breaking and entry when the premises are assumed

¹ The Eighth Circuit said: "[W]hile there are two aspects to the search and seizure which occurred here [interception of oral communications after forcible entry] as compared with one in *Osborn* and *Katz*, this difference is, for constitutional purposes, one of degree rather than kind." 541 F.2d at 698. In *Agrusa*, though the order permitted "forcible entry at any time of day or night", it was challenged unsuccessfully on Fourth Amendment grounds.

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to be unoccupied. The Congress recognized the existence of such devices as the martini olive transmitter, the spike mike, the infinity transmitter and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler or cigarette pack. 1968 U.S. Code Cong. & Ad. News 2183. Electronic devices in some instances might be installed in a manner not requiring entry by the officers into the premises. See *United States v. Ford*, 553 F.2d 146, 151 n. 20 (D.C. Cir. 1977); cf. the "spike mike" of *Silverman v. United States*, 365 U.S. 505 (1961). Because of its dangers, "bugging" as distinguished from wire-tapping, is relatively little used. See *United States v. Ford*, *supra*, 553 F.2d at 149, n. 12. The choice of methods should be made known to and passed on by the magistrate.

The lack of warrants for the entries is not the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in *Ford* and draw the line here.

APPENDIX B**ORDERS DENYING PETITION FOR REHEARING EN BANC DATED DECEMBER 15, 1977****UNITED STATES COURT OF APPEALS****SECOND CIRCUIT**

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of December, one thousand nine hundred and seventy-seven.

Present:

HONORABLE MURRAY I. GURFEIN

HONORABLE LEONARD P. MOORE

HONORABLE J. JOSEPH SMITH

Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

EUGENE SCAFIDI, a/k/a Bo and Luigi, BARIO MASCITTI, a/k/a Bari, ANTHONY DI MATTEO, a/k/a Apples, SAVERIO CARRARA, a/k/a Sammy Smash and Sammy, MICHAEL DeLUCA, a/k/a Mikey Junior, JAMES NAPOLI, JR. a/k/a Junior and Lefty, JAMES V. NAPOLI, SR. a/k/a Jimmy Nap, ROBERT VOULO, a/k/a the Kid, SABATO VIGORITO, a/k/a Sal,

Appellants.

24a

Orders

76-1495

A petition for a rehearing having been filed herein by counsel for the appellants (J. Napoli, Sr., J. Napoli, Jr., S. Vigorito, E. Scafidi, M. DeLuca and R. Voulo)

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. Daniel Fusaro

Clerk

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of December, one thousand nine hundred and seventy-seven.

UNITED STATES OF AMERICA,

Appellee,

v.

EUGENE SCAFIDI, a/k/a Bo and Luigi, BARIO MASCITTI, a/k/a Bari, ANTHONY DI MATTEO, a/k/a Apples, SAVERIO CARRARA, a/k/a Sammy Smash and Sammy, MICHAEL DeLUCA, a/k/a Mikey Junior, JAMES NAPOLI, JR., a/k/a Junior and Lefty, JAMES V. NAPOLI, SR., a/k/a Jimmy Nap, ROBERT VOULO, a/k/a the Kid, SABATO VIGORITO, a/k/a Sal,

Appellants.

25a

Orders

76-1495

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the appellants (James Napoli, Jr., James Napoli, Sr., Sabato Vigorito, Eugene Scafidi, Michael DeLuca and Robert Voulo), a poll of judges in regular active service having been taken and there being no majority in favor thereof,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Judges Mansfield and Oakes dissent in the denial.

s/ Irving R. Kaufman

IRVING R. KAUFMAN,
Chief Judge

APPENDIX C

PORTION OF DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DEALING WITH SURREPTITIOUS ENTRIES

DATED OCTOBER 14, 1976

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-against-

FRANK ALTESE, et al.,

Defendants.

Portion of Decision of the United States District Court

75-CR-341

MISHLER, CH. J.

* * *

Surreptitious Entry Into Apartment 309 and the HiWay Lounge

On December 8, 1972, upon issuance of the 309 I order, agents of the Federal Bureau of Investigation surreptitiously entered the subject apartment with a passkey when defendants were absent and installed the authorized bugging devices. Although the order did not expressly provide for covert entry, the authorizing court well knew that bugging devices were to be employed rather than wiretaps. Similarly, the April 12, 1973 HiWay I order made no express mention as to the means to be employed by government agents in planting the intercept devices. But the court was not without knowledge that surreptitious entry was planned. Special Attorney Barlow testified that upon submitting the surveillance application to Judge Bartels, the Judge inquired as to how undetected installation was to be accomplished. Barlow told him of their plans to enter that night when no one was present and emplace listening devices in the premises' rear area. The defendants contend the facial defectiveness of the orders in that they fail to specifically authorize surreptitious entry to install surveillance devices mandates suppression.

Is express authorization to enter premises in order to emplace electronic bugging devices so as to effectuate the purpose of an intercept order necessary, or is such authorization implicit in the grant of the intercept order? Before turning to this inquiry, a determination must be made as to whether the defendants have standing to assert this challenge.

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Riddled with inconsistencies and pervaded by nuances, the question of standing to challenge Fourth Amendment violations has often been considered by federal courts. Yet a synthesis of the leading case on the issue, *Brown v. United States*, 411 U.S. 223, 229, 93 S.Ct. 1565, 1569 (1973), seems to indicate that standing devolves on a defendant only where he was present on the premises at the time the warrant was executed or where he has a proprietary or possessory interest in the quarters searched.

Apartment 309, to which the first series of orders pertained, was leased to a Phyllis Engert, a doctor's receptionist who spent her working day hours away from home. While away, the named subjects, DiMatteo, Mascetti, Mustaccio, Scafidi, and "other yet unknown" carried on their "banking" operations. That they supplied her with illicit payments only gave them a license to use the premises during the daytime; it did not give them a proprietary interest to challenge nighttime entry. Defendants' alternative contention is likewise without merit. They argue that the continuous nature of electronic surveillance resulting in the seizure of conversations when they were on the premises confers standing to challenge the installation of monitoring devices when they were absent. Two distinct aspects circumscribe any search and seizure question; the means used to gain access to the confines to be searched, and the subsequent seizure itself. *United States v. Agrusa*, Slip op. at 11 (8th Cir. July 6, 1973). Defendants' claim, however, only involves the first aspect. Since only Engert's rights were arguably invaded by the initial entry, the defendants cannot be heard to challenge its propriety. Hence the court finds defendants Moscitti, Mustaccio, DeMatteo and Scafidi are without standing to challenge the propriety of the FBI's entry to install devices at Apartment 309.

A different situation lies with respect to defendant Napoli, Sr. and his right to challenge the forced entry into the HiWay Lounge. At the suppression hearing had herein, Napoli, Sr.'s

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sister, Mrs. Pascocello, testified as to the corporate structure behind the lounge's operations. After her husband's death she requested that Napoli, Sr. undertake the operations of the lounge and parent corporation Ampas Tavern, Inc. Mrs. Pascocello, however, remained corporate head and continued as the sole owner of the HiWay Lounge.

Though Napoli, Sr. used the HiWay Lounge solely for his gambling enterprise, he is not denied standing. His use of the premises for illegal purposes was with the knowledge and consent of the landlord, Mrs. Pascocello. Napoli, Sr. was the sole tenant in possession of the premises. The court finds therefore, that he has standing to challenge the admissibility of the tapes based on the government's surreptitious entry into the HiWay Lounge on the two occasions, *i.e.* prior to the interceptions pursuant to the April 12, 1973 HiWay I order and pursuant to Judge Judd's May 2nd, 1973 order. (See text, *infra* at 54-55).¹²

Title III is silent on whether agents may rightfully enter premises surreptitiously to install court ordered listening devices without express authorization. The legislative history is scant on the issue of congressional awareness of the possible necessity to employ covert tactics in implementing electronic surveillance. At best there exist only oblique references depicting an understanding of the problems surrounding installation and the shortcomings inherent in subsequent use when noise interference permeates the environment in which the bug is placed. See 114 Cong. Rec. 11958, 12989 (1968). This limited congressional direction is further compounded by a paucity of decisional law that deals only indirectly with the issue.¹³

In examining the safeguards that must be afforded, a significant distinction must be kept in mind. Twin aspects enshrine the process of electronic surveillance; the first is the

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means employed in installing the monitoring devices while the second is the actual interception itself. *United States v. Agrusa, supra*, at 11. It is this latter aspect at which the thrust of Title III is directed. Detailed facts must be outlined sufficient to show probable cause in order to guard against the indiscriminate initiation of electronic surveillance. To assure that only pertinent conversations are seized, strict minimization requirements are imposed. Fabrication and alteration are supposedly prevented by the demands for judicial sealing of taped interceptions. In short, Congress devised a scheme whereby the judiciary was vested with supervisory control over law enforcement's investigatory methods. Their intention was to ensure that the free flow of conversations and the sanctity of a person's random thoughts would not be jeopardized by technological developments in surveillance techniques and the consequent potentiality for abuse.

The very breadth of the statutory authority vested in the court coupled with the serious nature of the intrusion involved casts an extraordinarily heavy burden on the authorizing judge in deciding whether or not an intercept order is to issue. Not only must he find that sufficient probable cause exists, but he must be satisfied that electronic surveillance is the only investigatory device that will prove successful. The very detailed nature of the requirements set forth in 18 U.S.C. § 2518 demands that the closest scrutiny be given applications for intercept authorization.

That consideration was given by Judge Bartels when the HiWay I order issued on April 12, 1973. Moreover, this court exhaustively reviewed the government's affidavit submitted in support of that order and confirmed that sufficient facts were recited to establish probable cause and to show a particularized need for electronic surveillance. As was pointed out earlier in this opinion, it was obvious that listening devices installed in the

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rear area of the lounge were the only means left to the government by which to gather prosecutable evidence against the executives of the enterprise.

Moreover, Judge Bartels was not without knowledge as to what kind of devices were to be employed and how installation was to be effected. Special Attorney Barlow testified that in response to Judge Bartels' inquiry, he informed him of their plans to enter the lounge at night with a passkey in order to plant the bugging devices. The judge's question indicated his awareness of the inherent necessity to surreptitiously enter the premises to effectuate the court order.

It is the court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment. The circumstance underlying the issuance of an intercept order is analogous to the issuance of a traditional search warrant. Both the intercept order and the search warrant serve to sanction intrusions otherwise constitutionally prohibited. The privacy intrusion legitimized by the warrant is the entry into the private confines of the premises, the search and subsequent seizure of physical objects. The warrant itself serves to delimit the places to be searched and the items to be seized in keeping with the particularity requirements of the Fourth Amendment. *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022, 2038 (1971). The purpose to be served by the intercept order is to validate the intrusion resulting from penetrating the arena of confidentiality surrounding criminal conversation which monitoring enables, the interception of that secret conversation, and the subsequent recording. Entry to install bugging devices is but a mere condition precedent that must necessarily be satisfied if the

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purpose behind an intercept order is to be effectuated. Entry to initiate surveillance is not another intrusion. Hence, there need not be express authorization in the intercept order that issues for that prerequisite. Judicial control over agents' activities, which is the underlying intent behind the entire wiretap scheme, is adequately accomplished by the limitations specified in the order, in satisfaction of Fourth Amendment requirements, as to the type of surveillance authorized, the location where surveillance is to be conducted, and the type of conversations that can be intercepted.

To order suppression when a court order issued solely because it does not expressly define the permissible methods of emplacement is to propound mere form over substance. This is not a case where government agents were given unrestrained discretion to choose whatever means they desired to effect installation. Hence the court's pronouncement in *United States v. Ford*, 414 F. Supp. 879 (D.D.C. 1976), is inapplicable to the case herein. (See N. 13). Sworn testimony was given by Special Attorney Barlow concerning his conversations with Judge Bartels as to the contemplated method of entry. A record existed of the court's implicit consent to nighttime entry by use of a passkey. Where as here surreptitious entry during late night hours was shown to be the only means by which to effectuate the purpose of the HiWay I intercept order, it would contravene all logic to suppress the evidence gathered. Accordingly, Napoli, Sr.'s motion to suppress on the grounds that installation of monitoring was surreptitiously accomplished is denied.

Judge Judd's May 2nd Order

Upon expiration of the HiWay I order on April 30, 1973, monitoring agents discovered that the batteries supporting the listening devices had failed. The government had advance knowledge that an important meeting was to be conducted on

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May 3rd at the lounge. However, authorization from Washington for permission to apply for an extension order was not expected to arrive until May 3rd. The FBI's dilemma was obvious. If the HiWay II order would not issue until May 3rd, there would be no way to enter the premises to fix the lifeless devices before the impending meeting took place. Therefore, on May 2, 1973, Special Attorney Barlow appeared before Judge Judd seeking a warrant permitting nighttime entry into the lounge in order to correct the failure. Pursuant to Barlow's representations and the HiWay I order signed by Judge Bartels, Judge Judd issued an authorization accommodating the government's request.

Defendants argue the order was unlawful. They contend that Barlow's oral representations fell short of satisfying the requirements of 18 U.S.C. § 2518 (5) relating to the necessary contents of an application for an extension order. We disagree, however, with defendant's characterization of Judge Judd's May 2nd authorization as an extension order. It did not permit continued surveillance. The order simply authorized entry, seizure, and reparation of the malfunctioning devices. As such it is more properly characterized as a search warrant and the full set of requirements as detailed in 18 U.S.C. § 2518(3) need not be satisfied. Only probable cause need be found to justify its issuance. More than ample probable cause existed. Hence, the order lawfully issued.¹⁴

Conclusion

For all the reasons heretofore cited, defendants' motion to suppress is denied in all respects, and it is

SO ORDERED.

s/ Jacob Mishler
U.S.D.J.

*Portion of Decision of the United States District Court***FOOTNOTES**

* * *

- 12 The court finds that no other defendant, specifically James Napoli, Jr., had an interest in the premises sufficient to confer standing.
- 13 This court in its research found two reported decisions that dealt with the issue of surreptitious entry by government agents to install court authorized listening devices: *United States v. Agrusa*, Slip op. (8th Cir., July 6, 1976), and *United States v. Ford*, 414 F. Supp. 879 (D. D.C. 1976).

In *Agrusa*, the government agents investigating the defendant for the theft, possession, and sale of property stolen from interstate commerce, in violation of 18 U.S.C. §§ 659, 2315, and 371, secured a court order authorizing electronic surveillance for a period of 20 days at defendant's place of business. The order specifically authorized the government "to make secret and, if necessary, forcible entry any time of day or night . . . upon the premises . . . in order to install and subsequently remove whatever electronic equipment is necessary to conduct the interception of oral communications in the business office of said premises." Pursuant to this order, government agents forcibly entered the defendant's body shop after regular business hours and planted a listening device. On appeal, the defendant argued the district court could not validly issue such authorization consistent with the Fourth Amendment and other applicable law.

The Eighth Circuit found both constitutional and

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statutory support to reject Agrusa's contention; they held the government's forcible entry proper when executed pursuant to express authorization contained in the intercept order. The court, however, specifically noted that they were not rendering a decision on the propriety of the government's actions when taken without express authorization. *Id.* at 11, n. 13.

A similar question as to the propriety of covert actions by government agents was treated in *United States v. Ford, supra*. Therein, a twenty day intercept order provided:

(d) Members of the Metropolitan Police Department are hereby authorized to enter and re-enter the [premises] for the purpose of installing, maintaining and removing electronic eavesdropping devices. Entry and re-entry may be accomplished in any manner, including, but not limited to, breaking and entering or other surreptitious entry, or entry and re-entry by ruse or strategem.

The bugs were installed by a team of officers posing as members of the bomb squad during a bomb scare ruse used to evacuate the premises. The following day, it was discovered that the eavesdropping devices were not working. Police re-entered the same way and the malfunctioning devices were replaced. Representations were made to the reviewing court that judicial approval had been secured for the second entry. This authorization, however, was never transcribed.

The court recognized the inherent necessity to employ

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covert tactics in effectuating the intercept order, and the consequent power of the issuing court to authorize surreptitious activity. *Id.* at 882-83. The court, however found the above noted authorization overbroad in that it vested police with unrestrained discretion as to the means to be employed in installing the court ordered listening devices. The court indicated though, that the facial overbreadth of the provision might have been avoided if court authorization for each entry was recorded. The representations of the government attorney as to his conversations with the authorizing judge, concerning the means to be employed in entering the premises on each occasion, were never presented by affidavit nor sworn to under testimony.

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We submit, however, that if an extension order had issued prior to the government's re-entry and restoration efforts, express concomitant authorization to re-enter would not have to have been included in the continuation order. If a court is apprised of the need to re-enter to fix failing devices at the same time it is considering the application for the extension order, and the order in fact issues, there is inherent authorization for government agents to reenter and repair spent equipment if entry is shown to be the only way by which reparation can be accomplished. (See text, *supra* at 52-54).

APPENDIX D**STATUTORY PROVISION INVOLVED**

18 U.S.C. §2518(8)(b):

"(8)(a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517.

(b) Applications made and orders granted under this chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of

Statutory Provision Involved

good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years."